

CASE NO. 2009-0213
IN THE SUPREME COURT OF OHIO

ORIGINAL

OHIO APARTMENT ASSOCIATION, GREENWICH APARTMENTS LTD.,
AND D&S PROPERTIES,
Appellants,

v.

RICHARD A. LEVIN, TAX COMMISSIONER,
Appellee.

ON APPEAL FROM THE BOARD OF TAX APPEALS
CASE NO. 2006-0861

APPELLANTS' REPLY BRIEF AND
BRIEF IN OPPOSITION TO APPELLEE'S CROSS-APPEAL

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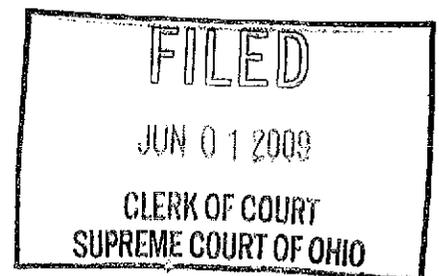
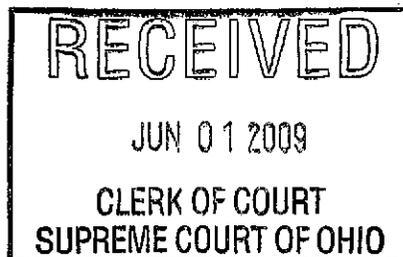


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INTRODUCTION

The Tax Commissioner (the “Commissioner”) puts up little resistance to the fact that Ohio Department of Taxation Rules 5703-25-18 and 5703-25-10, as required to implement the mandates of Rule 5703-25-18 (collectively, the “Rules”), violate Article XII, Section 2, of the Ohio Constitution and, thus, are unreasonable. The Commissioner’s attempts to create a substantial distinction between the Rules’ resultant categorization of real property owners also fall short. There are no material differences between residential rental property containing four or more units and that containing three units or, for that matter, all other residential property. The Rules are unreasonable and unconstitutional, and this Court should find them so.

The Commissioner’s second bite at the apple of his jurisdictional arguments does not preclude this Court’s determination of the unreasonableness and unconstitutionality of the Rules. Indeed, to the extent the Court finds itself reviewing these arguments again in the context of the Commissioner’s cross-appeal, this Court must have already denied those arguments raised in the first instance in his Motion to Dismiss. Ohio law – via the Constitution, statutes, and this Court’s precedent – establish Appellants’ right to challenge the Rules before the BTA and to then appeal the BTA’s decision to this Court. Appellants respectfully request that the Court deny the Commissioner’s cross-appeal and enter an order finding the Rules unreasonable.

ARGUMENT

I. APPEAL

The Commissioner offers no law or argument in the face of Appellants’ authority that would alter the fact that the Rules are unreasonable. Appellants have established that the Rules violate the Ohio Constitution’s Uniformity Clause, as well as state and federal equal protection.

For either or both of those reasons, therefore, the Rules cannot be reasonable and, pursuant to R.C. § 5703.14 and § 5717.04, must be stricken.

Appellants provide herein a brief response to each of the Commissioner's arguments opposing Appellants' bases for appeal and, in Section II *infra*, to each of his arguments supporting his cross-appeal. It should be noted, however, that the Commissioner's brief mixes and merges his jurisdictional and procedural arguments between his opposition to Appellants' appeal and his support of the cross-appeal. Rather than repeat arguments and responses herein, many of which have already been presented to the Court via briefing opposing the Commissioner's Motion to Dismiss, Appellants incorporate the arguments found in their opposition to the Motion to Dismiss and in opposition to the cross-appeal in Section II *infra*.

A. Unconstitutional tax rules cannot be "reasonable."

The Commissioner's lead defense to Appellants' appeal – an argument that is also asserted in support of his cross-appeal – is his incorrect proposition that the Rules are reasonable because they meet *his* definition of "reasonable," which includes only two elements. The BTA is, indeed, charged to make a determination of whether a challenged rule is reasonable. *See* R.C. § 5703.14(C). And, as the Commissioner notes, "reasonable" is not defined via statute. *See* Appellee's Br., p. 25. But, the Commissioner misplaces his reliance on the Court's findings in *Roosevelt Properties* and *Baxla* as support for his overly limited definition of "reasonable." *See* Appellee's Br., pp. 18-20. Simply because those decisions held that the respective rules were reasonable under the facts of those cases because they were consistent with the enabling statute (and a constitutional amendment in the case of *Roosevelt Properties*) or carried out the intent of

the legislature does not limit reasonableness to just those situations.¹ Rules that are not in conflict with a statute and were properly promulgated are not automatically reasonable, as the Commissioner proposes. See *The Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125 (1948) (providing a distinction between reasonableness and statutory conflict in noting that a rule “issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment”) (emphasis added) *quoted in* Appellee’s Br., p. 19. While a rule that conflicts with a statute must, of course, be unreasonable, so must a rule that conflicts with the constitution. No other result could be possible. If the Rules, as Appellants have established, are unconstitutional (regardless of whether other arguments accompany the constitutional arguments), they cannot be reasonable and must be stricken.

B. The Commissioner Virtually Admits That The Rules Are Non-Uniform.

Prior to the enactment of the Rules, all real property owners in Ohio *uniformly* enjoyed a 10% rollback on their property taxes. Then, the Rules separated out certain real property owners and *non-uniformly* precluded those property owners from receiving the 10% rollback. The Commissioner’s Brief explicitly recognizes this change, which is unconstitutional and in violation of the Uniformity Clause’s requirement that all real property be taxed “by uniform rule”:

¹ The Commissioner’s attempt to argue that *Roosevelt Properties* somehow distinguished a reasonableness analysis from a constitutional analysis is similarly unavailing. All the Commissioner does is pull out fragments from the Court’s dicta in support of such an argument. See Appellee’s Br., pp. 21-22. Both the reasonableness and the constitutionality of the rules at issue in that matter were before the Court and the Court issued its ruling on both issues. See *Roosevelt Properties Co. v. Kinney*, 12 Ohio St. 3d 7 (1984). This does not remove consideration of constitutionality from that of reasonableness and it certainly does not justify precluding Appellants from asserting similar constitutional arguments against the Rules, which were not authorized by any constitutional amendment as the applicable rules were in *Roosevelt Properties*.

[The 10% rollback, as originally enacted,] provided a uniform percentage reduction in all real estate taxes. . . . This across-the-board approach to the rollback remained in effect until tax year 2005 when the General Assembly eliminated the rollback for real property that is intended primarily for use in a business activity.

Appellee's Br., pp. 4-5 (emphasis added). It is not surprising, therefore, that the Commissioner fills only two pages when he then attempts to support the untenable position that the Rules do not violate the Uniformity Clause.

The Commissioner simply argues that the Rules are justified by the "partial exemptions" discussed in *Denison Univ. v. Bd. of Tax Appeals*, 2 Ohio St. 2d 17 (1965), and others – authority that Appellants explained in their opening brief was totally distinguishable. The Uniformity Clause does explicitly grant the General Assembly power to issue exemptions. *See* OHIO CONST. art. XII, § 2 ("Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed"). But, an exemption is a complete release from a duty or obligation. *See* Black's Law Dictionary (defining "exempt" as "[f]ree or released from a duty or liability to which others are held"). The Rules do not exempt anything, or part of anything. They, instead, set up two different tax rates: Neither group of property owners is completely released from the duty to pay taxes, nor is any certain percentage of the property value released from taxation, as is seen in the statutory examples previously discussed by Appellants.

The Commissioner does not and cannot explain how the Rules' differing tax rates can legitimately be considered an exemption. Nor does the Commissioner explain how the Uniformity Clause's requirement can have any meaning if the General Assembly has the authority to issue "partial exemptions," as he seeks to define them, by the Rules. Exemptions must be complete releases from taxation or else the Constitution's requirement for uniformity, found in the same clause, would be nullified. The Commissioner also argues that the Court has

recognized exemptions as constitutional “as long as a uniform tax rate is applied within a class validly set by the General Assembly.” Appellee’s Br., pp. 30-31 (emphasis removed). However, the Commissioner provides no authority whatsoever in support of that argument, because there is none.

The Rules are non-uniform and the Rules do not qualify under any of the recognized exceptions to the uniform taxation of real property provided in the Ohio Constitution, including exemptions, real property for the elderly and disabled, or the tax reduction factor. There can be no doubt, reasonable or otherwise, that the Rules violate the Uniformity Clause and, thus, are unreasonable.

C. The Commissioner Relies on Purported Distinctions Between Rental Property Owners That Are Immaterial And Not Rationally Related To The Rules’ Impact.

The fact that both parties address the issue of equal protection – with each side disputing whether a rational basis exists for the disparate treatment given to the two groups of property owners created by the Rules – illustrates that the Rules cannot possibly satisfy the Constitution’s requirement that all property owners be taxed uniformly. Even if the Rules satisfied that requirement, the Commissioner’s arguments in support of the Rules’ categorization of property owners do not provide evidence of any “real and substantial distinction” between owners of residential real property containing four units and all other residential property. *See State ex rel. Swetland v. Kinney*, 62 Ohio St. 2d 23, 30 (1980) (“*Park V*”) (quoting *Xenia v. Schmidt*, 101 Ohio St. 437 (1920)). There simply is no real or substantial distinction between those two groups, the lack of which is only heightened when assessing the Rules’ disparate impact on three-unit rental properties and four-unit properties. The Commissioner, indeed, fails to provide

justification for the Rules sufficient to satisfy the requirements of equal protection granted by Article I, Section 2 of the Ohio Constitution.

If real property was to be taxed differently based on use, the most obvious and only conceivable supportable distinction would be that between residential and other real property. The Rules' definitions attempt to do that, but, in so doing, they mistakenly place a significant group of residential property – including four unit rental homes – in with coal mines and factories. *See* O.A.C. 5703-25-10(A)(2) (establishing second classification of property apart from “residential property”) (Appx. 0032). The Commissioner points to appraisal methodologies and minor differences in value inflation over time, but these do not provide any real basis on which to justify differing tax treatment. The Commissioner points to the tax reduction factor's use of similar categories. But, simply because those categories are authorized by an explicit constitutional amendment for the tax reduction factor does not establish a real and substantial distinction between the two groups as applied to the Rules. And, the Commissioner points to differing tax systems for owner-occupied real property and residential rental property. However, this cannot explain why rental property with three units is treated differently than that with four units. *See* Supp. 0023-0024 (Tr., pp. 89-90). Properties with four or more units are no less residential in their use than three-unit properties or single-family homes. The properties all provide housing for people and all require similar ongoing maintenance, while otherwise reflecting only a difference in lifestyle choice or financial capability. *See* Supp. 0007 (Tr. p. 25); Supp. 0008 (Tr., pp. 27-28); Supp. 0015 (Tr., pp. 54-55). The Rules are unreasonable and violative of state and federal equal protection.

II. CROSS-APPEAL

Five of the Commissioner's seven propositions of law are largely duplicative of the procedural and jurisdictional arguments that he already made in his Motion to Dismiss and that the BTA rejected. Not one of the arguments is availing: Ohio law establishes that Appellants' application to the BTA was heard on ripe issues before the proper body with the requisite authority and procedures to establish a record for this Court's subsequent review. Rather than restate in full those arguments and responses, which are set forth in detail in Appellants' Brief in Opposition to the Commissioner's Motion to Dismiss, Appellants will only briefly outline here again why each of the Commissioner's jurisdictional arguments fails. The BTA had and this Court has the jurisdiction to pass on Appellants' appeal and the Commissioner cannot avoid a substantive review of the Rules.²

A. **The Existence Of A Statute Underlying The Rules Is Not Determinative Of Appellants' Right To Challenge The Rules.**

The Commissioner makes much of the existence of R.C. § 319.302's language setting forth the framework for the Rules. But, nowhere in Ohio law is it decreed that a taxpayer's right to challenge tax rules is eliminated by the fact that a similar enabling statute exists. If anything, such a determination should only serve as recognition that the statute also must be unconstitutional, as both the Rules and R.C. § 319.302 are here. *Compare* R.C. § 319.302 with O.A.C. 5703-25-18, 5703-25-10.

² To the extent the Commissioner suggests that Appellants should have brought their challenge in another venue, based on the decision of the Franklin County Court of Appeals, such a suggestion would be misleading and improper. The Court issued no directive that the proper method to challenge the Rules would be via declaratory judgment, and Ohio law provides otherwise as discussed herein. Such a suggestion by the Commissioner is also disingenuous given that his opposition to Appellants' earlier mandamus action specifically identified an appeal to the BTA pursuant to R.C. § 5703.14 as an available legal remedy, as opposed to mandamus. Appellants' challenge to the Rules was properly put before the BTA and is now properly before the Court.

- **Appellants' appeal is ripe despite the fact that the statute has not yet been found unconstitutional.**

Ohio law expressly dictates the proper time for a challenge to a tax rule, and Appellants' challenge without question satisfies that standard. Under R.C. § 5703.14(C), Appellants were authorized to initiate their "appeal . . . any time after the rule is filed with the secretary of the state" Nowhere in the statute is there any reference to the need to declare an underlying statute unconstitutional prior to initiating an appeal – the Commissioner's sole argument as to ripeness, which is again unsupported by any authority. *See Appellee's Br.*, pp. 22-24. The Rules were filed with the Secretary of State in 2005 and Appellants' action began in 2006, after the Rules' unconstitutional tax treatment took effect. The Rules have already been applied to increase Appellants' real property tax by greater than 10% for residential rental property containing four or more units. The appeal is ripe, and it is the proper vehicle to alleviate the continuing injuries suffered by Appellants and others.

- **The existence of an underlying statute does not deprive Appellants of standing.**

Using arguments that appear to overlap with his allegations regarding "ripeness," the Commissioner also seeks to preclude Appellants' challenge to the Rule by arguing that the Rules cannot have injured Appellants because the statute exists. The Commissioner's arguments are baffling. As the BTA held when initially presented with this argument, "[t]he conclusion sought by the commissioner [that the statute must first be declared unconstitutional] is premature, as the appellants are entitled to provide evidence and testimony to this board in support of their position that the rules in question are 'unreasonable.'" Appx. 0025 (BTA Order), p. 5. R.C. § 5703.14 does not limit the BTA's authority to accept, or Appellants' standing to file, an application for review of a tax rule based on the existence or validity of an underlying statute. Instead, Appellants' standing arises "at any time after the rule is filed with the secretary of state." R.C. §

5703.14(C). Standing is lacking only when the rules have been “previously heard and passed upon” by the BTA, as is not the case here. *Id.*; see also *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St. 3d 375, 376 (2002) (determining constitutionality of R.C. § 5739.01 under the Uniformity Clause after the applicants brought the constitutional argument via a refund request and appeal before the Board).

The Commissioner cites only one distinguishable case in support of the argument that a rule must be different from the statute for anyone to be injured by the rule. The Commissioner points to the issuance of a “bulletin” in *MCI Telecommunications v. Limbach*. Appellee’s Br., pp. 25-26. However, he then immediately distinguishes that bulletin from the Rules at issue here: “[T]here is no dispute that, unlike the bulletin in the *MCI Telecommunications* case, Ohio Adm. Code 5705-25-18 certainly carries the weight of a rule” Appellee’s Br., p. 25 (emphasis added). A party’s inability to challenge a “bulletin,” as opposed to a rule as provided for in R.C. § 5703.14, is not relevant to the Appellants’ challenges to the Rules. The statute clearly grants Appellants standing and is in line with the “wide latitude” given by the General Assembly “to a taxpayer who wishes to challenge a rule promulgated by the Tax Commissioner.” Appx. 0025 (BTA Order), p. 5 (quoting *Baxla*). Appellants have been injured by the Rules, and their injuries can be alleviated by a determination that the Rules are unreasonable. Based on such a determination, the Commissioner will be bound to follow the decision and will have to treat all real property uniformly for purposes of assessment and collection. The Commissioner’s arguments fail.

B. The BTA And This Court Are The Proper Fora For Appellants’ Challenge To The Rules.

The Commissioner argues that Appellants may not assert their challenge before either the BTA or this Court, despite significant precedent establishing the right to this procedure.

- **The proceedings below were quasi-judicial.**

The Commissioner relies on precedent that Appellants thoroughly distinguished from the instant appeal to argue that this Court lacks jurisdiction to review the BTA's Order and, in doing so, confuses the proper analysis. The precedent cited by the Commissioner establishes that an assessment of whether the proceedings were quasi-judicial or quasi-legislative is based on a review of the nature of the proceedings (Were the proceedings adversarial?) and the procedures implemented (Was a hearing held? Was evidence presented?). Nowhere in his precedent or Ohio law is it suggested that proceedings initiated under R.C. § 5703.14 are automatically deemed quasi-legislative. *See also Roosevelt Properties Co. v. Kinney*, 12 Ohio St. 3d 7 (1984) (appeal of taxpayers' challenge under R.C. § 5703.14 to a tax rule originally heard by the BTA). Rather, the required assessment reveals that the proceedings below clearly were quasi-judicial, and the Commissioner's distinguishable citations only support that conclusion. For example, *Zangerle v. Evatt*, 139 Ohio St. 563, syl. 1, 2 (1942), establishes that proceedings before an administrative agency involving a hearing and the submission of evidence are quasi-judicial. Because the *Zangerle* proceedings, which were initiated by county auditors via a simple "communication" requesting a rule review, did not involve such procedures, the matter was deemed quasi-legislative. *Id.* at pp. 565, 574-577; *see also Cambridge Commons Ltd. Partnership v. Guernsey Cty. Bd. of Revision*, 106 Ohio St. 3d 27, 29 (2005); *Haught v. City of Dayton*, 34 Ohio St. 2d 32, 35 (1973) ("Quasi-judicial proceedings' [a]re defined as those in which the function under consideration involves the exercise of discretion and requires notice, a hearing and the opportunity for the introduction of evidence."); O.A.C. 5717-1-15(G) ("All hearings [before the BTA] shall proceed in a similar manner to a civil action, with witnesses

sworn and subject to cross-examination.”). The instant proceedings involved both a hearing and an extensive presentation of evidence, both highly adversarial in nature.

The Commissioner also seeks to diminish the fact that the appeal was initiated by two taxpayers and an association representing numerous other taxpayers with a concrete justiciable case. *See* Appellee’s Br., pp. 14-16. However, *Zangerle* established that the role of taxpayers – as opposed to the administrative officer-complainants in that matter – would provide a quasi-judicial basis for this Court’s review. *Zangerle*, 139 Ohio St. at 579 (“When a case reaches this court involving the valuation of taxation of some specific property of a taxpayer and the question of whether rule No. 2 or any other rule is reasonable and lawful is presented, we will, of course, pass upon such concrete question.”). The Rules’ broad application across all real property containing four or more residential rental units owned by Appellants and others similarly situated does not make the challenge to the Rules any more or less concrete. The Rules have resulted in a greater than 10% increase in real property taxation to each such property, a fact that the Commissioner has not disputed. *See* O.A.C. 5703-25-18 (Appx. 0045). Via hearing and presentation of evidence, the taxpayer-Appellants challenged the Rules’ impact on their real property taxes in an adversarial proceeding. Indeed, R.C. § 5703.14, the basis for Appellants’ challenge to the Rules, requires an injury in order to initiate such an action. *See* R.C. § 5703.14(C) (“any person who has been or may be injured by the operation of the rule” may file an application for review of the rule). Thus, as provided for by R.C. § 5717.04, Appellants’ “proceeding to obtain a reversal, vacation, or modification of a decision of the [BTA]” is appropriately made “by appeal to the supreme court.”

- **This Court has the authority to issue a determination on the Rules' constitutionality based on the arguments and evidence presented to the BTA.**

The Commissioner acknowledges that if this proceeding is quasi-judicial, and it is for the reasons set forth and incorporated above, “the BTA, as an adjunct to the judicial branch, can allow constitutional issues, even if, because the agency itself can’t adjudicate constitutional claims, its role is to take evidence for ultimate consideration by the Court on appeal.” Appellee’s Br., p. 14 (citing *Cleveland Gear v. Limbach*, 35 Ohio St. 3d 229, 232 (1988) (“[T]he [BTA] must receive evidence concerning this [constitutional] question if presented, even though the [BTA] may not declare the statute unconstitutional.”)). Indeed, this Court repeatedly has affirmed that a taxpayer may assert a constitutional argument before the BTA and then take an appeal of that argument to this Court. *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St. 3d 375, 376 (2002) (issuing decision on a constitutional issue after recognizing that the BTA lacked the jurisdiction to make that assessment); *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St. 3d 195 (1994) (resolving an equal protection argument raised by the applicant before the board and again on appeal to this Court); *Cleveland Gear Co.*, 35 Ohio St. 3d at 232 (citing *Bd. of Educ. of South-Western City Schools v. Kinney*, 24 Ohio St. 3d 184 (1986)); *Herrick v. Kosydar*, 44 Ohio St. 2d 128, 130 (1975); *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405, syl. 1 (1960). Nothing precludes this Court, therefore, from issuing a ruling on the Rules’ constitutionality under the arguments presented by Appellants.

The Commissioner also attempts to block a review of the Rules’ constitutionality using another iteration of the incongruous logic that a rule can be unconstitutional, but reasonable. This argument has been discussed in several contexts already, including his Motion to Dismiss, and in Appellants’ affirmative appeal. See Section I(A) *supra*. The Commissioner, indeed, acknowledges the Court’s right to make constitutional determinations on appeal from the BTA,

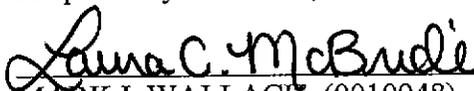
but he argues that this Court cannot reach that determination because its review is limited to the Commissioner's own definition of reasonableness. *See* Appellee's Br., pp. 18-22. Under R.C. § 5717.04, "[a]ppeals from decisions of the [BTA] upon all other appeals or applications filed with and determined by the [BTA] may be instituted by any of the persons who were parties to such appeal or application before the [BTA]" and filed with this Court. In the Court's review process, it must assess whether the BTA's decision was "unreasonable or unlawful." Ohio Rev. Code § 5717.04. As he did in his Motion to Dismiss, the Commissioner ignores the Court's responsibility to assess whether the BTA's decision as to the Rules' reasonableness was unlawful. Nothing in Ohio law, the Commissioner's authority, or reason, would limit the Court from making the determination that the BTA's decision regarding the Rules was unlawful and/or unreasonable because the Rules are unconstitutional. This is, in fact, the exact scenario of the Court's holding in *Roosevelt Properties Co. v. Kinney*, 12 Ohio St. 3d 7 (1984). If the Court was so limited, the Court would be precluded from overturning a rule that is in clear conflict with the Ohio Constitution -- as the instant Rules are. This would be an absurd limitation on the Court's authority to remedy Appellants' injury. The statutory standard of "reasonableness" must include whether a rule is constitutional, and the Appellants were entitled to establish a record for their constitutional arguments before the BTA prior to proceeding to this Court.

CONCLUSION

This Court has the authority and the evidence to reach the determination that the Rules are unreasonable. Based on the hearing and evidence provided to the BTA, it is clear that the Court should strike the Rules and remedy the injuries suffered by Appellants in the form of more than 10% higher real property tax. Rules that apply two different effective tax rates to real property owners cannot satisfy the constitutional requirement that all real property be taxed

uniformly. And, rules that apply different effective tax rates to residential rental property containing four units and those containing three units and all other residential real property also cannot satisfy the constitutional requirements for equal protection. The Commissioner should be ordered to apply the Rollback to all real property in accordance with constitutional mandates and as applied prior to the Rules' enactment.

Respectfully submitted,



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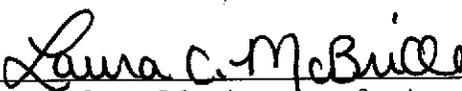
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Appellants' Reply Brief and Brief in Opposition to Appellee's Cross Appeal* was served this 29th day of May, 2009, by First Class U.S. Mail, postage pre-paid upon:

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